SUBRAMANIAN v. RETNAM

[O.C.J. (Gill J.) November 26, 1965]

[K.L. — Civil Appeal No. 9 of 1965]

Contract — Written contract in English — Defence that person signed acknowledgment of loan only as surety — Judgment of magistrate against weight of evidence.

The plaintiff sued the defendant for $1,000 being money lent. The defendant had signed a written acknowledgment in the English language of the loan but in his defence he stated that he thought he was only signing as surety. The learned magistrate rejected the defence of mistake of fact but went on to hold that as the defendant had signed the document on the understanding that the debt was due from his brother and had given no consent that he himself would be liable to the plaintiff, there was in fact no consent given and therefore no contract.

Held: (1) despite the fact that the defendant was ignorant of the English language, he would be bound by the written contract entered into by him in the absence of fraud or misrepresentation;

(2) in this case the learned magistrate having rejected the defence of mistake of fact and there being no evidence of coercion, fraud or misrepresentation, the learned magistrate should have given judgment in favour of the plaintiff.

Cases referred to:—

(1) *Ismail bin Savoosah & Ors.* v. *Hajee Ismail* (1889), 4 Ky. 453, 458.

(2) *Selvadurai* v. *Chinniah* [1939] M.L.J. 253; [1938] F.M.S.L.R. 293.

CIVIL APPEAL.

Ranjit Singh for the appellant.

Morris Edgar for the respondent.

Gill J.: This is an appeal from a decision of the magistrate's court, Kuala Lumpur, dismissing the action in that court by the plaintiff-appellant against the defendant-respondent for the recovery of a sum of $1,000 being money lent.

The facts of the case are relatively simple. The plaintiff's evidence in support of his claim in the magistrate's court was that on 3rd December, 1958 the defendant, whom he had known for over ten years, approached him for a loan of $1,000. He agreed and lent the money as requested, whereupon the defendant gave him a document in the following terms:—

"This is to acknowledge receipt of the sum of $1,000 (dollars one thousand only) by me the undersigned V. Retnam, identity card No. SL. 120601 of No. 21, Main Road, Setapak, Kuala Lumpur from Mr. Subramaniam son of Somaloo, identity card No. SL. 364907, residing at 3½ Mile, Setapak, Kuala Lumpur, free of interest.

I hereby undertake and bind myself to repay the said sum of $1,000 with no interest to Mr. Subramaniam son of Somaloo after the month of November, 1959 and this shall not be negotiable or transferable to any one by the said Subramaniam.

Dated this 3rd day of December, 1958."

The document was duly signed by both parties and stamped. The money was not repaid in spite of repeated demands.

The defendant's case was that, although he signed the document (P.1), he never borrowed any money from the plaintiff. His written statement of defence was to the effect that the money was borrowed by his brother Veeramani from the plaintiff's mother in various sums in the form of cash and gold from time to time in the year 1953, and that he executed the note as guarantor in favour of the plaintiff at the request of the plaintiff's mother when she failed to find his brother for repayment of the loan.

In his evidence at the trial the defendant's story was that his brother Veeramani had taken money on several occasions from plaintiff which in all came to $1,000 and that he signed P.1 on being asked to give the plaintiff a letter to the effect that he would pay the money on behalf of his brother. The plaintiff brought the document to him and he signed it not as guarantor but on the understanding that the debt was due from his brother. The document was not read out to him, but the plaintiff told him that it was prepared in accordance with his instructions to the plaintiff. He did not know what the document contained, but it was prepared according to his instructions with the signature of his brother on it, although he said with the same breath that his brother had no connection with it. In re-examination he said that he believed that his brother would pay and he signed the document in that belief.

The learned magistrate has stated in his grounds of judgment that he did not agree with the defence counsel's contention that the agreement (P.1) was void on the ground that the parties to it were under a mistake of fact essential to the agreement. He found as a fact that the plaintiff knew what he was doing in that he had the document prepared and explained to himself and to the defendant and then made the defendant sign it, although there was nothing on the document itself to suggest that it was interpreted to the parties or that the defendant knew English. He then says in his grounds that, as the defendant had signed the document on the understanding that the debt was due from his brother and had given no consent that he himself would be liable to the plaintiff, there was in fact no consent given, so that there was no contract. Finally, he says that as neither party had called Veeramani as a witness, although he was present when the transaction took place on 3rd December, 1958, it would only be fair to assume that Illustration (g) of section 114 of the Evidence Ordinance was not invoked.

I must say that I find it difficult to follow the learned magistrate's reasoning when he says that, as no consent was given, there was no contract, after rejecting the argument that the agreement was void because the parties to it were under a mistake of fact essential to the agreement. It is clear from the evidence that

the respondent knew that the document in question was in respect of a loan transaction and he signed it of his own free will. The point which the learned magistrate failed to consider or completely ignored was: why did the respondent sign the document if his contention was that he had nothing to do with the transaction and that the debt was due from his brother? It is common ground that Veeramani was present at the time of the signing of the document. If the loan was to be repaid by him, why was he not made to sign the document? This was another point, in my opinion a vital point, which the learned magistrate failed to appreciate.

It would appear that the learned magistrate was unduly influenced by the fact that no evidence was produced to show that the document was explained to the respondent who knows no English. If that was his reason or one of his reasons for dismissing the action, in my opinion he was wrong. For my saying so I find support in the following statement of the law, with which I respectfully agree, in the judgment of Wood Ag.C.J., in *Ismail bin Savoosah & Ors.* v. *Hajee Ismail*:— [1]

"It was argued that the defendant being ignorant of the English language he is to be excused on that account from the performance of his contract, but it is to my mind clear that in the common principles which govern the law of contract, the person who contracts by a written document, whether or not he understands the language in which it is written, is bound, in the absence of fraud or misrepresentation, by the terms of that contract, as to which proposition no objection was authoritatively sustained."

That brings me to one of the grounds of appeal in this case, namely, that this was not a case where there was any evidence of coercion, undue influence, mistake or misrepresentation. As I stated above, it is clear from the evidence that the respondent signed the document on which the claim was based of his own free will. He knew that the document was in respect of a loan transaction. He was not forced to sign the document. Thus there could be said to be no mistake or misrepresentation as to the nature of the transaction, and quite clearly there was no fraud. As regards the document itself, there was no irregularity.

Mr. Morris Edgar has argued on behalf of the respondent that, in view of what the learned magistrate has said about neither party calling Veeramani, this was a case where the evidence was evenly balanced, so that on the authority of *Selvadurai* v. *Chinniah* [2] the learned magistrate had no option but to dismiss the action, as the plaintiff had failed to prove his case. In my opinion there is not much force in that argument. Quite clearly, the learned magistrate did not rely on any presumption arising out of the fact that Veeramani was not called as a witness. Assuming that the oral evidence of the parties was evenly balanced, there was the document to create a preponderance in favour of the plaintiff. I do not see, therefore, how it can be argued that the evidence was evenly balanced.

I am not forgetting that an appellate court is never in as good a position to estimate the value of *viva voce* evidence as the magistrate who saw and heard the witnesses, but in coming to the conclusion that this was a case in which the learned magistrate should have found for the plaintiff I am not attempting to ride roughshod over any of his findings of fact. Indeed it is not clear from his judgment what findings of fact he made. In any event his ultimate decision was against the weight of and contrary to the evidence taken as a whole.

I would therefore allow the appeal, set aside the learned magistrate's order of dismissal of the action and substitute for it a judgment in favour of the appellant in the sum of $1,000. The respondent will pay the costs of this appeal and of the action in the court below.

Before concluding the matter I must say that I am deeply grateful to Mr. Morris Edgar for drawing my attention to the case of *Ismail bin Savoosah & Ors.* v. *Hajee Ismail, supra,* even though it was against him.

Appeal allowed.

Solicitors: *Athi Nahappan & Co.; Morris Edgar & Co.*

TAN BENG CHYE v. PUBLIC PROSECUTOR

[F.C. (Tan Ah Tah Ag.C.J., Buttrose and Chua JJ.) November 30, 1965]

[Singapore — Federal Court Criminal Appeal No. 28 of 1965]

Penal Code ss. 376 and 511 — Attempted rape — Ingredients of offence — Using criminal force with intent to outrage modesty under s. 354 of Penal Code.

The appellant had been convicted of attempting to commit rape. The evidence showed that the appellant had taken the complainant to some bushes where he took off his shorts and lowered his inner pants to his knees. He then made the complainant take off her coat and trousers, leaving her in her knickers, which she refused to take off. An old Chinese man then came to the place and the complainant shouted to him for help. Thereupon the appellant pulled up his inner pants, put on his shorts and started to run while buttoning them.

Held: (1) two ingredients must be proved before a person can be convicted under section 511 of the Penal Code, that is, first, there must be an attempt to commit the offence and second, some act must be done towards the commission of the offence;

(2) in this case the acts done by the appellant did not amount to an attempt to commit rape and therefore the conviction must be set aside and a conviction for using criminal force with intent to outrage modesty substituted for it.

FEDERAL COURT.

Dato' David Marshall for the appellant.